In the Supreme Court of the United States.

OCTOBER TERM, 1900.

HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 278.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

The defendant, Homer Bird, was charged with and convicted of the crime of murder. It appeared from the evidence that the defendant originally came from the city of New Orleans, where, in March, 1898, he joined with Charles Sheffler, R. L. Patterson, and the deceased, J. H. Hurlin, in a prospecting tour for gold in the Territory of Alaska. The four men each agreed to furnish $500, but Sheffler failed to put up his quota, and Bird furnished $1,000, and the remainder of it was contributed by Hurlin and Patterson. The party started from San Francisco, at which point they were joined by a woman by the name of Naomi Strong, who seems to have been Bird's mistress. The party had equipped itself with a small steam launch and a scow with provisions. They sailed from San Francisco May 21, 1898; reached St. Michaels in July, and

about a week later started up the Yukon River. In September, when they were at a point on the Yukon River, they determined to go into winter quarters. It is apparent from the testimony that during the progress of the journey serious difficulties had arisen between the partners, which were partly due to differences of opinion as to the respective shares of the partners in the joint enterprise and to the quarrelsome disposition of the defendant. As a result of these differences Sheffler, Patterson, and Hurlin determined to leave Bird and the woman, but, at Bird's request, agreed to remain until a cabin, which they were constructing for winter quarters, could be finished. On the morning of September 27, 1898, the defendant had arisen early and returned for breakfast. Sheffler, Hurlin, and Patterson sat down on a seat facing the stern of the boat. Bird was seated on his bed immediately in the rear of Hurlin and about 6 feet away. Naomi Strong asked Bird to come down and take some breakfast. He replied that he would take his breakfast where he was. What followed is best described by Naomi Strong, who saw the whole occurrence:

> "We didn't have room for a table; they were eating it in their laps in little tin plates. So I heard Mr. Bird's gun click, like one was going to break it open or close it, and when I heard Mr. Bird's gun I looked up and I saw him raise up. I didn't see the gun, and I didn't like the look on his face, but I didn't pay any attention until I heard the gun, and I looked up and saw Mr. Bird standing there with his gun in his

hand closing it, and I looked at him, and Mr. Scheffler saw me looking and he turned round, and then Bird he said, "Now you Dutch ———, I have got you," and he shot Hurlin—shot him back of the left ear—and Mr. Scheffler jumped up and said, "For God's sake, don't shoot me," and he was facing Homer, the defendant, and Mr. Patterson jumped behind me, and I jumped and ran, and as I passed the defendant he fired at Mr. Patterson, and then Mr. Patterson jumped overboard, and I climbed out on the beach, and Mr. Patterson, after he jumped overboard, walked around on the right side of the boat, and Mr. Bird ran and headed him off at the bow of the boat, and Mr. Patterson was begging for the defendant not to shoot him. He said, "Homer [Bird], for God's sake don't shoot me any more." And Homer said, "Don't you come up to me or I will shoot you." He was walking, begging for Homer not to shoot him, and all at once Bird said, "Bob, you dirty ———, you are the cause of all this," and he shot at him again and missed him, and in the meantime he put the gun down in the bow of the boat, and Mr. Patterson crawled on the bank and sat down, and I was on the beach crying, and Mr. Patterson saw me and said, "Naomi, have mercy on me." And then Mr. Patterson held out his hand to Mr. Bird, and when Mr. Patterson held out his hand to Mr. Bird, Mr. Bird told me to take hold of Bob, and I went up to Mr. Patterson and took his hand and I said, "Where is Hurlin?" And he, defendant, said, "He is dead."

It also developed that after the shooting Patterson, in fear of his life, professed friendship for Bird, and asked him to spare his life, and Bird relented so far as he was concerned. Bird then compelled the woman to assist him in burying Hurlin.

The murder was, therefore, an inexcusable atrocity, and unless the defendant has been unfairly convicted his sentence should stand.

In support of his appeal the appellant has filed twenty-five assignments of error. Many of these, however, raise the same question, and some of them have apparently been abandoned. In his brief the appellant sets forth in a condensed form the alleged errors upon which he relies. He says:

> "The errors that will be relied upon relate to the action of the court in impaneling the jury; sustaining improper challenges for cause made by the Government; in admitting improper evidence in behalf of the plaintiffs; improper argument of the district attorney permitted by the court over the defendant's objection; errors in instructions given to the jury, and the failure of the court to send out with the jury on their retirement the written instructions given."

In replying to this brief I will follow this classification, and will assume that any errors not included within it are abandoned, and will not, therefore, discuss them.

I.

THE ILLEGALITY OF THE JURY.

It appears from the bill of exceptions (Transcript, p. 75) that the list of petit jurors, numbering 75, which had been legally drawn, was duly served upon the defendant as "the panel of jurors from which the trial jurors for the trial of this cause would be drawn." It further appears that on November 10, 1899 (folio 3), the defendant was arraigned, "whereupon copies of the indictment, a list of the witnesses to be called by the plaintiff upon the trial, and a list of the petit jury for this term were served upon defendant in open court by the United States attorney." On November 13, 1899, the defendant pleaded not guilty to the indictment, and on December 1, 1899, the following proceedings took place as set forth in the record (folio 16):

> "This cause coming on for trial, the clerk proceeded to call the venire of the petit jury under the direction of the court, and the regular panel of the petit jury being exhausted because of the challenges exercised by the parties, the court made the following order, to wit:
>
> It appearing to the court that there is not present a petit jury sufficient to complete the jury in this cause, the United States marshal or his deputy is hereby ordered and directed to summon from the bystanders a sufficient number of citizens of the Territory and of the United States, having the qualifications of jurors, to complete the jury.

> In pursuance of the foregoing order, the United States marshal summoned and returned the following-named persons, to wit: H. W. Price, J. W. Price, John Reck, E. D. Rasmussen."

Thereupon the jury was sworn. Thus far the record discloses no objection by the defendant or exception by him to the manner of selecting the jury. It appears, however, from the bill of exceptions (folio 76), as follows:

> "Afterwards, on the 1st day of December, 1899, when the defendant was put upon trial, it appeared that of said 75 persons whose names appeared upon the said list served upon the defendant there remained only 43 of said names in the box from which said jury was being drawn. It further appeared that 24 jurors on said list of jurors served upon defendant had been excused by the court prior to the calling of this cause for trial, and of the remaining 8 persons missing from said list whose names were not in the box 1 was sick and the remaining 7 had not been served by the marshal. Defendant thereupon objected to further proceeding with the trial of said cause at said time, and the further selecting and drawing of said jury from said box, because he had not been served with a correct list of the names in such jury box, and because 24 jurors whose names appeared upon the list served upon the defendant had been excused without the consent of the defendant, and the defendant was thereby denied his legal right to be tried by a jury selected from the panel served upon him; but the court overruled

> said objection and ordered the trial to proceed, to which ruling of the court defendant then and there duly excepted."

It further appears that when the panel was exhausted and the talesmen were summoned the objection was renewed, and when overruled an exception was duly taken.

The objection thus urged seems to be a twofold one—first, that jurors who are summoned, and whose names appear upon the list which is served upon the defendant, can not be excused by the court without his consent; and, secondly, that the jury can not be completed, when the panel is exhausted, by summoning talesmen. The appellant in his brief, however, abandons the second ground for the objection, for he says:

> "We do not question the propriety of completing a jury by summoning bystanders when the regular panel has been legally exhausted. But the point is, that the court arbitrarily excused a large part of the regular panel, thus creating a necessity for the summoning of bystanders, which would not otherwise have arisen."

The right, therefore, of the court to excuse jurors after a list has been served upon the defendant is called into question. I may suggest at the outset that the record fails to disclose that "the court arbitrarily excused a large part of the regular panel," or even that the excusing of such jurors was without the implied consent of the defendant. All that the record says is that "twenty-four jurors had been excused by the court prior to the calling of this cause for trial." But

whether these jurors were excused in open court when the defendant was present therein, or whether the defendant, before his case was called for trial, had knowledge that such jurors were excused, does not appear from the record. It is to be presumed that these jurors were excused, as jurors are ordinarily excused, by application in open court and appropriate minute thereof, to which the defendant could have access. In every panel of jurors there are always some who have been drawn who either can not be summoned, or, if summoned, can not attend. Death, sickness, advanced age, absence, and many other causes make this inevitable. Every practicing attorney therefore knows that it is extremely probable, if not certain, that some of the panel as drawn will either not be summoned or will not attend, and he knows moreover that he can learn before he enters upon the trial of the case which of the jurors have been excused. It is fair to presume that the defendant, through his counsel, knew that which he might have known on proper inquiry, and it thus appears that although he was served with a correct list of the jurors on November 9, he made no objection to the commencement of the trial, so far as the regularity of the jury was concerned, until the case had actually commenced and the jury had been partially drawn.

There is, however, no merit in the objection. Section 1033 of the Revised Statutes provides that in any capital offense other than treason a "copy of the indictment and list of the jurors and witnesses shall be

delivered to him at least two entire days before the trial." Assuming that this act of Congress has application to the Territorial court for the district of Alaska, it can not bear the construction which appellant places upon it. Its obvious meaning is that the list of the petit jurors *as drawn* shall be furnished the defendant. It can not mean that the list of the petit jurors who are able to serve at the time the trial is commenced shall be served upon the defendant, for that would often be impossible. The list must be served at least two entire days before the trial, and it is always possible that in those two days a juror may die or be otherwise incapacitated to serve. The only list, therefore, which the defendant has a right to ask under the statute is a list of the entire panel, and as its only purpose is to give him the right to inquire before the trial as to any juror who by any possibility may be called to try his case, that object is as effectually accomplished when he receives the entire panel as if he should be given a list of those only, who have been summoned as well as drawn, and who have not been excused. It is suggested, however, that in some way the identity of the list is affected by the action of the judge in excusing a number of the jurors. I can not believe that there can be any serious question as to this. The right of the court to excuse jurors has been exercised time out of mind and must exist. No authority can be quoted to show that the court must consult every defendant in every criminal case pending in his court before excusing a juror. That also would be almost an impossibility.

The only question, therefore, is whether the excusing of a considerable portion of the jury destroys the identity of the list which has been furnished the defendant. No authority is cited to support this position. The defendant has a list of the jurors who are not excused and who may try his case. This is all that he can ask. It may be that if the court excused so many jurors that less than twelve remained, the purpose of the section already cited would be defeated. But in this case forty-three jurors remained, who were upon the panel, and the exhaustion of this number was due to the exercise of the right of challenge; and this, as defendant admits, justified the summoning of the talesmen.

Independent of this fact, section 1033 of the Revised Statutes has no application to Territorial governments. (*Thiede* v. *Utah Territory*, 159 U. S., 510, 514, 515; *Miles* v *United States*, 103 U. S., 304; *Page* v. *Burnsteine*, 102 U. S., 664, 668; *Reynolds* v. *United States*, 98 U. S., 145; *Good* v. *Martin*, 95 U. S., 90; *Hornbuckle* v. *Toombs*, 18 Wall., 648; *Clinton* v. *Englebrecht*, 13 Wall., 434.) No section of the Territorial laws of Alaska has been cited by appellant which makes it necessary to furnish a list of the jurors, and the right did not exist at common law.

II.

COMPETENCY OF JURORS.

This forms the subject of the fourth, sixth, seventh, and eighth assignments of error. The fourth assignment of error refers to the action of the court in sus-

taining the challenge of the Government to the juror E. R. Jaeger. It appears from the record (folios 78 and 79) that Jaeger, being examined on his voir dire, testified in substance that the fact that the defendant had a family and brought his wife and child into court would tend to influence his verdict. When asked as to what he meant by this, he said as follows:

> Q. (By the COURT.) It would take stronger evidence for you to bring in a verdict of guilty than if he were a single man?
>
> A. If he was a single man without a family.
>
> Q. (By the COURT.) Yes; but with a wife and child it would take stronger testimony if he did have a wife and child than it would if it was shown that he had no wife and child?
>
> A. Yes; I think it would; that is, it would take stronger testimony for me to render the same verdict.

The court thereupon sustained the Government's challenge. Counsel for appellant is of opinion that this is clearly erroneous and says that "a juryman who knows so little of human nature that he would require no stronger evidence to convict a man in the one case than he would in the other would be unfit to pass upon the life of a fellow man." This necessarily means that there is one measure of proof in criminal cases for married men and another for single men, and the proposition is so entirely without either principle or authority to support it that any argument seems superfluous. It may be proper to show by evidence what manner of man the defendant is, whether married or single, rich or poor, learned or ignorant, and these

facts often throw light upon a particular transaction. The defendant was not denied this right. The court simply ruled that when a proposed juror, before he has heard any evidence, lays down the arbitrary rule that he would require more evidence to convict a married man than a single man of a given crime, he showed his own incompetency, for the law gives no sanction to any such presumption. It is well known that defendants often shield themselves behind the very natural sympathy which jurors feel for the innocent wife and children of such defendant, and the court discharged its duty by guarding against this unfair appeal to sympathy.

The sixth, seventh, and eighth assignments of error relate to the other jurors, to whom the objection is made that they were excused. It appears that they had acted as jurors within one year of the term of court at which the defendant was tried, although five of them had not been drawn on the regular panel, but had been summoned as talesmen. They were nevertheless jurors, duly called in accordance with law and sworn as such, and the act of June 30, 1879 (21 Stat., 43), provides that "no person shall serve as a petit juror more than one term in any one year." The court, having considered this fact, thought it better to excuse the jurors. This was clearly within his discretion. The jurors could have been excused by the court of its own motion before the trial commenced, and the defendant would not have been prejudiced.

Moreover, the improper *exclusion* of a juror is not,

by the weight of authority, a ground of exception. (1 Thompson on Trials, sections 43, 118, 120.) The main reason assigned for this rule is that the prisoner has no just cause of complaint if he is tried by twelve qualified and impartial men. "A competent and unbiased juror was selected, sworn," and he "had, therefore, a trial by an impartial jury, which was all" he "could demand." (*Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S., 642, 646; *Southern Pacific Company* v. *Raub*, 7 U. S. App., 84, 94.) His own right of peremptory challenge is "not of itself a right to select, but a right to reject jurors." (*Pointer* v. *United States*, 151 U. S., 399, 412.) He can not complain of an erroneous overruling of his own challenge for cause, provided he could have remedied the error by a peremptory challenge. (*Spies* v. *Illinois*, 123 U. S., 131; *Hopt* v. *Utah*, 120 U. S., 430.) The decisions in the State of New York are to the contrary, but two judges dissent in the leading case of *People* v. *McQuade* (110 N. Y., 284), and the ruling of this court is in line with the general weight of authority. (Cases cited in note to the McQuade case, 21 Abbott, N. C., 458.) "But in truth and according to law there is no necessity nor right that a prisoner shall be tried by particular jurymen, till the prisoner has been given in charge to the jury." (Lord Campbell, C. J., in *Mansell* v. *The Queen*, 8 El. & Bl., 54, 79.) The trial judge may exclude of his own motion, and no exception lies if an impartial jury is obtained. (*United States* v. *Jones*, 69 Fed. Rep., 973, 975, 976, and cases cited.)

Another reason for the rule is given in *People* v. *Murphy* (45 Cal., 137, 142), namely, that error in excluding a proper juror can not be repaired upon a second trial.

III.

ADMISSION OF EVIDENCE.

The tenth assignment of error refers to the testimony of one Charles Sheffler, a witness in behalf of the Government, who was offered to show the motive on the part of the defendant to kill the man of whose murder he was charged. It does not appear from the bill of exceptions whether any objection was made at the time the questions were asked which elicited the testimony. (See folios 99 and 100.) Apparently the testimony was given by the witness without objection at the time the questions were asked, and afterwards counsel for defendant made such objection. Subsequently, however (folio 101), counsel for the Government asked the following question: "State generally what was the bearing and conduct of this defendant toward the party from the time you left St. Michaels until the time you went into winter quarters," and this question was permitted. It is difficult to understand upon what ground the objection could have been sustained. The testimony threw a strong light not only upon the motive which prompted the defendant to kill Hurlin, but also upon the vital question whether the defendant shot in self-defense or shot Hurlin without any adequate provocation. In order to determine these facts it was necessary to show the relations between this party of five

people who were making a joint expedition up the Yukon River, the nature of their expedition, their attitude toward each other, their quarrels, if any, or rather their differences of opinion. During the whole progress of the journey the parties seem to have disagreed about their interests in the joint enterprise, and about September 24 they determined to separate, Hurlin, Patterson, and Sheffler going one way, and the defendant and Naomi Strong, going another. According to the testimony of the prosecution, on the 27th, while the party was at breakfast, the defendant suddenly, and without warning, took a shotgun, killed Hurlin, and shot and seriously wounded Patterson, and it was therefore necessary for the prosecution to prove that this killing was malicious and that no adequate excuse existed for it. The defendant denied that there had been these disagreements and heated quarreling between the parties on the journey up the Yukon and testified that there had been no serious disagreement until within a few days of the murder. It was therefore necessary to show whether this statement was true or not, and, incidentally, to show a growing hatred during the progress of the journey on the part of the defendant against the two men, one of whom he murdered and the other of whom he seriously wounded. Given this quarrel and these differences of opinion with regard to the division of the common property and a motive was disclosed for the murder, and the fact of such murder became more reasonable. If, however, they were, as defendant claimed, on friendly terms until within a few days of the murder, the prob-

ability of the Government's version became materially lessened. In such cases, where motive and malice are in issue, a reasonable latitude must be allowed in the proof of circumstances which seek to show either. A grudge may be cherished for a long while and a cause for a quarrel may have its origin months before the actual explosion. As was said by Mr. Justice Brown in the recent case of *Fitzpatrick* v. *United States* (178 U. S., 313):

> "There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. * * * In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed."

The thirteenth assignment of error refers to the explanation of the witness Charles Sheffler as to why he did not tell of the condition of affairs at the cabin on the evening after the killing of Hurlin and the shooting of Patterson. The bill of exceptions does not show how this testimony arose and whether the preliminary question was objected to. Presumably Sheffler, on the day following the murder, had failed to disclose to someone the circumstances of the killing, and, ordinarily, this fact would weigh against his testimony as

to the fact of such killing. Under ordinary circumstances a man who has seen A kill B will disclose the fact at the earliest possible moment. To rebut, therefore, any suggestion of bad faith or untruthfulness, it was necessary to show special reason for Sheffler's silence, and his answer did this. He was 600 miles up the Yukon River and in a wilderness. He had seen the defendant, without any warning or provocation, kill one man and attempt to kill another. The woman was the mistress of the defendant. He naturally supposed that any attempt on his part to disclose the facts of the matter would lead defendant in his desperation to commit another murder. Such fact was proper for the jury, and the inference was for them. For the same purpose Sheffler was permitted to testify, for the purpose of explaining his failure to disclose the fact of the murder, that after it took place he told Patterson that he was going to get help, and Patterson said "That man will finish killing me," and thereupon the witness "promised to stick by him." All of this was competent as bearing upon the good faith of the witness. Unless he could adequately explain why he did not promptly disclose the fact of the murder, his testimony would have little weight. His explanation was entirely reasonable. As long as he remained in camp the defendant would not dare to kill Patterson with the witness present, but if the witness started to the nearest settlement, the defendant, who might close the mouth of his mistress, might well have made away with the man whom he had once tried to kill and who would be

an important witness in testifying to the circumstances under which defendant killed Hurlin.

The fourteenth assignment of error refers to some testimony as to a quarrel between the defendant and his mistress, Naomi Strong. It is impossible to tell from the record the purpose for which this testimony was offered, or its connection with the case. The bill of exceptions also fails to disclose whether the objection came after the testimony was given, or was an objection to a preliminary offer. I respectfully submit that counsel should not expect this court to pass upon such questions without bringing up in the bill of exceptions sufficient testimony to show in what connection the testimony was given and in what way the question arises, and whether the objection was made seasonably, or after the testimony had been given without preliminary objection. So far as the present incomplete record goes, it is difficult to imagine what possible harm the testimony in question did the defendant, and this court will not invalidate a verdict unless it is reasonably clear that the defendant has been prejudiced.

IV.

The twentieth assignment of error refers to the refusal of the court to permit an experiment to be made outside of the court room as to the effect of firing a shotgun at a given distance. Patterson had stated that when the defendant had fired at him he was not more than 6 feet distant. The defendant claimed that he was 30 feet away from Patterson when he shot

him. It must be remembered that the defendant was not indicted for killing Patterson, but for killing Hurlin. After the defendant killed Hurlin, Patterson jumped off the boat and was fired upon in the water. The fact that Patterson was shot at was competent to show the wicked malice of the defendant, and it also threw light upon the fact that the cause for the shooting was the difference between the partners as to the division of the property; but whether Patterson was 6 feet or 30 feet away from the defendant was not important. At all events, the right to make an experiment outside of the court room is a matter that may be left safely to the discretion of the trial judge, and with an incomplete record before it this court should, I submit, decline to interfere with the exercise of such discretion.

The twenty-second assignment of error relates to an argument of the district attorney to the jury. It surely can not be error for the district attorney to state that which was a fact, and of which this record, incomplete as it is, gives abundant evidence, that the defendant "was saving exceptions to the action of the court and availing himself of every technicality in the hope of securing a reversal of the case in the Supreme Court." The jury saw this for themselves. If this were not the purpose of taking the exceptions, it is difficult to understand why the exceptions were taken. The jury could fairly presume that the defendant in this case, as in every case, has his right to that which he thinks to be error and his right to have the case reviewed in a

higher court. Nor was it a legal error to state that which is also a fact, that the defendant's counsel, in the discharge of their duty, "were attempting to make a record to reverse the judgment of this court in the Supreme Court." If this were not the purpose of the exceptions, what was their purpose? It can not be error to tell a jury that the defendant is exercising his rights. The only question there can be, therefore, is as to whether the district attorney should have argued that defendant's counsel "placed their reliance" upon the possible action of an appellate court. For aught that appears, this may have been the fact. The guilt of a defendant may be so clearly demonstrated by the evidence that the defendant is hopeless as to the verdict of a jury, but it is relying upon some technical flaw in the trial of the case. Whether this were true of the present case it is impossible to determine from the incomplete record. It is sufficient to say that this statement of the district attorney is not reversible error. There is nothing to show that he persisted in this line of argument after objection was made to it. But even if he had, some latitude must be allowed to counsel in the argument of a case. Counsel for defendant are left free to exercise the finesse of advocacy in seeking to convince juries of the innocence of their clients in the teeth of the testimony. In so doing they frequently comment upon the confidence or want of confidence of the Government in its case, and the rules of advocacy can not be so limited that they may not do so. The same right must be accorded to the district attorney. It is

better to have a full discussion of the matter, even though some arguments employed by counsel are fallacious, than to attempt by arbitrary rules to limit such methods of reasoning. There are, of course, positive prohibitions in argument which must be observed. The district attorney may not comment upon the failure of the defendant to take the stand; but this is so because of positive enactment. But with this and other well-recognized exceptions the confidence of counsel, real or assumed, in the strength of their own case or the weakness of their adversary's must not be taken too seriously.

V.

INSTRUCTIONS OF THE COURT.

No complaint is made as to the portion of the judge's charge which is the subject of the twenty-third assignment of error, except that it does not go far enough and state a possible qualification. Here again the incomplete and unsatisfactory bill of exceptions prevents this court from knowing whether the charge as a whole did not adequately present the defendant's theory of the case. It may well be that the qualification, or rather additional instruction, which defendant's counsel sought to add to the portion of the charge already quoted was the subject of separate instructions. Where the complaint is not with what was said, but with what the court failed to say, and only a few sentences of the judge's charge are quoted, it would be obviously unfair to reverse on that account, for the instruction prayed

for may well have been in the portions of the charge not quoted. It is quite obvious, from an inspection of this record, that the two theories of the case were presented to the jury—the one, that the defendant, maliciously and without adequate cause, killed the deceased, and the other, developed by his own testimony, that the killing was in self-defense. See defendant's testimony, folio pages 96, 97, 98, 99. It is inconceivable that the court in its instructions did not charge with reference to the defendant's theory, and I submit that it will not be reversed on an isolated fragment of the charge.

The same is true of the twenty-fourth assignment of error, which is torn out of its proper context. If the portion of the charge is correctly transcribed, it is obvious that the court meant to charge that if certain facts were found by the jury to be as stated the defendant was guilty of murder.

I again suggest that which is stated in connection with the preceding assignment of error, that it would be both unsafe and unfair to the trial judge to reverse on account of an isolated sentence from the charge torn from its context where the whole charge is not set forth.

VI.

The twenty-fifth assignment of error complains of the refusal of the court to send out with the jury, when they retired to consider the case, the written instructions which were read to the jury by the court.

It does not appear from the bill of exceptions that

counsel for the defendant made any request that the court should send out to the jury his written instructions. All that is said is, after the court had failed to send out the written instructions and had filed them with the clerk, "the defendant then and there excepted."

It further appears by the bill of exceptions (p. 112) that the written instructions were "filed with the clerk and remained in his custody and in his office." It thus appears that these written instructions were in the possession of the legal custodian of the records of the court, and were accessible to the jury if the jury needed them. There is no reason to believe, therefore, that the defendant suffered any prejudice by the fact that the jury did not have actual physical possession of the written instructions.

It was not necessary at common law either to reduce the charge to writing or to send it to the jury, and the only statutory requirement that such course be taken is found in the act of March 3, 1899, providing a code of criminal procedure for Alaska. Did this code apply to the trial of this case? While it was enacted before the trial, it became a law after the commission of the offense, and the offense being a felony the code can not be held to apply to the trial of this offense without becoming an ex post facto law. (*Thompson* v. *Utah*, 170 U. S., 343, 346, 350, 351.) This was the view which the court below took of the matter, for, while under the Oregon code, which prevailed prior to the act of March 3, 1899, the Government was entitled to only five peremptory challenges,

under the latter law it was entitled to ten challenges, and the court restricted the Government to five challenges. In any event there is no reason to believe that the error prejudiced the defendant.

The other assignments of error need not be dwelt upon. There is no reason to believe that as to any of them the defendant suffered any prejudice.

As has been shown at the beginning of this brief, this murder was heartless and cowardly in the extreme, and unless errors have been committed to the substantial prejudice of the defendant the sentence imposed upon him should be carried out.

Respectfully submitted.

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